Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

H.N. AND FRANCES C. BERGER FOUNDATION,

Petitioner,

v.

CITY OF ESCONDIDO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division One

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the state court was correct in ruling that a City's mobilehome rent regulation ordinance was not an "as-applied" regulatory taking where the parkowner had stipulated that it was not contending that the application of the ordinance (1) had denied it a "fair return" nor (2) had deprived it of "substantially all economically viable economic use of its property" and the state court found that there was substantial evidence that the Ordinance as applied substantially advanced a legitimate state purpose.

LIST OF PARTIES

The parties to the proceeding below were the Petitioner H.N. and Frances C. Berger Foundation ("Berger") and Respondents City of Escondido ("City"), as well as five members or former members of the City of Escondido Mobilehome Park Rental Review Board ("Board") who were sued both individually, and as members of the Board: Jerry Harmon, Sid Hollins, Richard Foster, Lori Holt Pfeiler, and Elmer Cameron.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents' City of Escondido, et al. ("City") respectfully request that this Court deny Petitioner H.N. and Frances C. Berger Foundation's ("Berger") Petition for Writ of Certiorari ("Petition") seeking review of the California Court of Appeal decision in this case.

OPINIONS BELOW

On August 30, 1996, the California trial court (San Diego Superior Court, Case No. 63317) issued its Judgment granting City's Motion for Nonsuit and Dismissing Berger's Action. See Judgment, Petition Appendix, C1-C3; see also Statement of Decision, Petition Appendix, D1-D16.

On August 17, 1998, the California Court of Appeal (4th Civ. No. D027377) issued an unpublished decision affirming the Judgment of Dismissal. See Slip Opinion, Petition Appendix, A1-A22.

On November 24, 1998, the California Supreme Court (Case No. SO73664) issued an unpublished ruling denying Berger's Petition for Review. See Ruling, Petition Appendix, B1.

JURISDICTION

The California Court of Appeal Opinion was entered August 17, 1998. On November 24, 1998, the California Supreme Court denied Berger's Petition for Review. Berger's Petition for Certiorari was docketed with the

United States Supreme Court on February 22, 1999. The jurisdiction of the United States Supreme Court was invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

The California Mobilehome Residency Law (Cal. Civ. Code, Section 798 et seq.) governs many aspects of the relationship between a mobilehome park owner and a mobilehome owner residing on a rented space in a mobilehome park. [California Civil Code, Sections 798.55, 798.73, and 798.74 are set forth in the Petition Appendix, F1-F5.]

Proposition K, a voter initiative (the Escondido Mobilehome Rent Protection Ordinance) ("Ordinance"), established mobilehome space rent regulation for mobilehome parks located in the City. [An uncodified version of the Ordinance is set forth in Petition Appendix, E1-E10.][1]

[1] Pursuant to the Ordinance if a parkowner wants to increase space rents it must first obtain approval from the Mobilehome Park Rental Review Board (Board). Ordinance,

STATEMENT OF THE CASE

A. Background.

The City of Escondido is located in Northern San Diego County in the State of California. It has a substantial number of mobilehome parks and mobilehome owners located within its boundaries.[2]

On June 7, 1988, the City voters passed Proposition K, an initiative ordinance which established mobilehome park space rent regulation. Ordinance, Petition Appendix, E1-E10. The Ordinance became effective July 7, 1988.

On December 21, 1988, Fairfield Homes, Inc. (which had developed the Town and Country Club Mobilehome Park ("Park")) *gifted* this 155 space Park to the H.N. and Frances C. Berger Foundation ("Berger"). Petition Appendix, A2.

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section 3. The City Council is the Board. Ordinance, section 2(a). Following a hearing the Board, applying various factors, determines such rent increase as it determines to be just, fair and reasonable. Ordinance, section 4(g).

[2] A January 22, 1999 report by the California Department of Housing and Community Development listed 28 mobilehome parks and approximately 3600 mobilehome spaces in Escondido. According to a December 1998 report from the City's Rent Control Administrator, 2114 of these spaces were subject to the City's Rent Ordinance. The vast bulk of the remaining spaces were on rent control exempt long term leases, or exempt because they were resident owned.

B. Berger's Prior Suits Challenging City's Ordinance Were Dismissed.

On May 31, 1998, prior to seeking any rent increase under the Ordinance, Berger filed a state court action. *H.N. and Frances C. Berger Foundation v. City of Escondido*, San Diego Superior Court, No. N43874. It alleged that the Ordinance constituted a "taking" of its property because it did not permit Berger to automatically raise rents when a mobilehome was sold or transferred. It also alleged that the Ordinance was unconstitutional because no emergency existed to justify its imposition. Petition Appendix, D3.

On August 15, 1989, the trial court issued an Order Granting the City's Demurrers and dismissing the action. *Ibid.*[3]

On October 31, 1990, the Court of Appeal issued its decision affirming the lower court dismissals. *Yee v. City of Escondido*, 224 Cal.App.3d 1349 (1990). After the California Supreme Court denied review (224 Cal.App.3d at 1362) the United States Supreme Court granted certiorari, and on April 1, 1992, unanimously affirmed in *Yee v. City of Escondido*, 503 U.S. 519 (1992).

In *Yee*, this Court held that the City's Ordinance did not constitute a "physical taking" of Petitioners' property. 503 U.S. at 531-32, 538-39. This Court also held Petitioners' *facial* regulatory taking claim "ripe" (*Id.* at 534)

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[3] Berger's appeal (*H.N. and Frances C. Berger Foundation v. City of Escondido*, 4th Civ. No. D010769) was consolidated with eleven similar suits *sub nom, Yee v. City of Escondido*. Petition Appendix, D4.

but did not rule on the claim because it was not among the questions raised in the Petition for Certiorari. *Id.* at 535-39.

While the consolidated *Yee* case was still on appeal, on February 1, 1991, Berger filed a federal suit challenging the City's Ordinance on virtually identical grounds. *H.N. and Frances C. Berger Foundation v. City of Escondido,* U.S. Dist. Ct., So. Dist. Cal., No. 91-0153-K(BTM). Petition Appendix, D4.

On June 12, 1991, the District Court granted City's Motion to Dismiss, finding that Berger's federal action was barred by the res judicata effect of the prior state court decision in *Yee, supra,* 224 Cal.App.3d 1349. *Ibid.*

On June 19, 1992, after this Court's decision in *Yee,* Berger dismissed its appeal to the Ninth Circuit. *Ibid.*

C. The Instant Suit

On December 11, 1991, Berger filed an application seeking a monthly space rent increase of $69.70. Following hearings the Board awarded Berger a $10 per month per space increase. Petition Appendix, D4.

1. The Trial Court Proceedings

On February 7, 1994, Berger filed this action in state court. After City Demurred, Berger filed an Amended Complaint seeking a Writ of Administrative Mandamus, alleging that the Board's decision granting it a $10 rent increase was invalid and had denied Berger a "fair

return" and included causes of action for Inverse Condemnation, Declaratory and Injunctive Relief. *Id.* at D5-D7.

On January 31, 1995, the trial court issued an Order granting City's Motion that the Writ of Administrative Mandamus Cause of Action be heard first. *Id.* at D7. On March 7, 1995, the trial court granted in part Berger's request to augment the administrative record with certain evidence and remanded the matter to the Board. *Ibid.* In response the Board vacated its $10 rent decision and after new hearings voted to grant Berger a $16.12 per month per space rent increase.[4] *Ibid.*

On August 25, 1995, the trial court ruled that in light of the Board's new rent decision, Berger's Cause of Action for Administrative Mandamus was "moot."[5] *Id.* at D8.

On April 8, 1996, following the filing of Trial Briefs on the only remaining Cause of Action (Inverse Condemnation), the parties entered into certain stipulations (*Id.* at D9) including that Berger was not contending that it was "denied a fair return," nor that it was "denied substantially all economically viable use of its land."

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[4] In addition, in order to eliminate any possible harm due to the delay from its January 1994 decision, the Board granted Berger an additional interim $6.40 per month per space rent increase for 17 months. *Id.* at D7-D8.

[5] On February 5, 1996, the trial court also dismissed the Cause of Action for Injunctive and Declaratory Relief. *Id.* at D8.

On June 17, 1996, after Berger's Opening Statement, the trial court granted City's Motion for Nonsuit.[6] *Id.* at D10-D11.

2. The Court of Appeal Decision

On August 17, 1998, the Court of Appeal affirmed in an unpublished decision. Petition Appendix, A1-A22. Initially, it pointed out that pursuant to *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), a land use regulation applied to a particular property effected a taking if "it does not substantially advance legitimate state interests" or "denies an owner economically viable use of his land." Petition Appendix, A7. The Court concluded that Berger failed both prongs. *Id.* at A9.

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[6] Pursuant to California procedure a Motion for Nonsuit at the time of the Plaintiff's Opening Statement concedes the truth of the facts stated, but only for purposes of the nonsuit motion. 7 *Witkin*, California Procedure (4th Ed. 1997), "Trial," § 416. In making the motion the defendant does not waive his right to offer evidence in the event the motion is not granted. California Code of Civil Procedure, section 581c(a).

Berger's implication (Petition at 6-7) that the City would not have contested Berger's alleged "evidence" concerning the "premium" if the Motion for Nonsuit had been denied is wrong. Not only had the City filed a Motion in Limine (which was never decided due to the grant of the Nonsuit) to prevent Berger's expert from testifying because in deposition he had admitted "I have no conclusions in this case. . . . I have not studied this particular park," but also the City had its own expert who was prepared to rebut Berger's expert if Berger's expert was permitted to testify.

In discussing the "economic" prong, the Court indicated that for the term "taking" to have any meaning, the deprivation must be "substantial." Petition Appendix, A9-A11. Under the circumstances, the Court recognized that the term "substantially all economically viable use" was a "reasonably reliable measuring device in a regulatory taking case." *Id.* at A11. Since Berger had stipulated that it was not contending that it had been denied "substantially all economically viable use," the Court concluded that Berger had failed to meet the "economic" prong of the *Agins* test. *Ibid.*[7]

In discussing the "government interest" prong, the Court of Appeal rejected Berger's "heightened scrutiny" argument. Petition Appendix, A14. The Court pointed out that this case was not one of the "relatively narrow class of land use cases" described in *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 868 (1996), *cert. denied*, 519 U.S. 929 (1996), such as where a property owner had been denied all use of his property or where the City was trying to exact money as a condition for granting a permit. *Ibid.* Instead, the Court pointed out that the case was similar to *Kavanau v. Santa Monica Rent Control Board*, 16 Cal.4th 761, 775 (1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 856, 139 L.Ed.2d 755 (1998), where the Court had analyzed a rent

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[7] In discussing the "economic" prong, the Court of Appeal also indicated that a "fair return" inquiry was a proper precursor to determining whether or not Berger had been denied "substantially all economic viable use." *Id.* at A11-A13. The Court of Appeal concluded that since the trial court had correctly resolved that ultimate inquiry any error in its perception of the role of "fair return" in the *Agins* test was harmless. *Id.* at A13.

control ordinance using a multi-factor approach [citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)].

The Court of Appeal also cited *Landgate, Inc. v. California Coastal Commission*, 17 Cal.4th 1006, 1022 (1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 179, 142 L.Ed.2d 146 (1998), where the California Supreme Court had indicated that the proper inquiry is whether there is an "objectively, sufficient connection between the land use regulation in question and a legitimate governmental purpose so that the former may be said to substantially advance the latter." Petition Appendix, A15.

The Court of Appeal pointed out that this Court had accepted the general validity of rent control as advancing a legitimate governmental purpose (citing *Pennell v. City of San Jose*, 485 U.S. 1, 12-13 (1988)) and therefore there was "a strong presumption in favor of the Ordinance's validity." Petition Appendix, A15-A16.

The Court of Appeal rejected Berger's argument that "as applied" the Ordinance resulted in a "one time wealth transfer" which raised the cost of housing, rather than lowered it, and therefore was in contravention of the alleged stated goals of rent control. The Court pointed out that in the context of an "as applied" claim the focus is not on whether such a wealth transfer exists, but whether the rent increases provide a return sufficient to ameliorate the effects of this alleged "premium." *Id.* at A16. Since Berger had stipulated that it was not contending that it had been denied a "fair return" the Court held that Berger's argument must fail. *Ibid.* The Court also pointed out that to the extent that Berger was really

making a "facial challenge"[8] to the Ordinance, its facial claim was subject to res judicata,[9] would fail for lack of standing or ripeness and therefore should not be considered. *Ibid.*

The Court of Appeal also rejected Berger's argument that the application of the Ordinance was a "scheme" to drive down the value of its property, concluding that Berger's evidence would not show that the Board's actions were improper. Petition Appendix, A17-A19. Again referring to *Landgate, supra,* 17 Cal.4th at 1022, the Court pointed out that the focus should not be on an alleged "sinister purpose" but on whether the application of the regulation objectively "advanced some legitimate state purposes." Petition Appendix, A19. Utilizing that test, the Court concluded that the Board's rent decision had substantially advanced the purpose of the Ordinance in preventing "excessive" rent increases.[10] *Ibid.* The Court

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[8] The Court of Appeal noted that at least two federal courts (*Levald, Inc. v. City of Palm Desert,* 998 F.2d 680, 689 (9th Cir. 1993), *cert. denied,* 510 U.S. 1093 (1994) and *Carson Harbor Village Ltd. v. City of Carson,* 37 F.3d 468, 474 n.5 (9th Cir. 1994)) had specifically rejected the notion that Berger's challenge to the alleged "premium" was an "as applied" challenge. Petition Appendix, A16-A17.

[9] The Court of Appeal had earlier noted (Appendix at A-2, n.1) that Berger had been unsuccessful in its prior "facial" taking challenges to the Ordinance's validity.

[10] Berger's argument (Petition at 7) that the Court of Appeal erred in referring to tenants living on fixed incomes in the Park ignores the reality of mobilehome living in Southern California. A March 27, 1990 County of San Diego "County Wide Mobilehome Task Force Final Report" found that 80% of the mobilehome spaces in the County were occupied by "senior

further found that the $16.12 rent increase was supported by "substantial evidence,"[11] and therefore the "government interest" prong was also satisfied. *Ibid.*

On November 24, 1998, the California Supreme Court denied Berger's Petition for Renew. Petition Appendix, B1.

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households" who are "generally small elderly families with fixed incomes." *Id.* at 5. The Court of Appeal was aware that in response to Berger's request for a $69.70 rent increase the Board had received about 100 letters from Park residents explaining in heart wrenching detail how the requested increase would cause them extreme hardship. Appellant's Appendix at 66.

[11] Although as discussed *supra*, in the instant case Berger did not challenge that the $16.12 rent increase provided it with a "fair return," Berger later filed a new state suit challenging both the $16.12 and a subsequent $19.27 Board rent decisions. *H.N. and Frances C. Berger Foundation v. City of Escondido, et al.*, San Diego Superior Court, Nos. N69473 and N70537. After the trial court found that "substantial evidence" supported both decisions, it issued a Judgment dismissing both suits. On February 26, 1999, the Court of Appeal affirmed in part and reversed in part in an unpublished decision. *H.N. and Frances C. Berger Foundation v. City of Escondido*, 4th Cir. No. D029003. It concluded that "although the board's findings represent a conscientious effort to balance all competing social and economic factors, they lack an essential basis for the authorized rental increases: the setting of a fair return on value, allowing for inflation without placing undue emphasis on the "gift" "factor or other financing effects." Slip. Op. at 18. The Court of Appeal therefore ordered the matter remanded back to the City for further administrative proceedings. Slip. Op. at 24. In regard to Berger's remaining causes of action for regulatory taking, declaratory relief and violation of 42 U.S.C. § 1983 the Court of Appeal affirmed the dismissal of those claims. Slip. Op. at 23-24.

WHY THIS WRIT SHOULD BE DENIED

I

THIS IS NOT AN APPROPRIATE CASE TO DETERMINE IF VACANCY CONTROL IN A MOBILEHOME RENT ORDINANCE CONSTITUTES A REGULATORY TAKING.

The primary thrust of Berger's Petition is that the Ordinance is a "regulatory taking" because it does not permit Berger to automatically raise rents whenever a mobilehome is sold or transferred. As a result of this restriction on the space rent of the new mobilehome owner (often referred to as "vacancy control"[12]), the prior mobilehome owner allegedly receives a "premium" from the purchaser corresponding to the mobilehome's increased value attributable to the Ordinance. Petition at 4. Berger further argues that this "premium" accrues only to the initial homeowners (a "one time wealth transfer") "at the time the Rent Ordinance was adopted" and does not benefit subsequent buyers. Petition at 4-5. As a result Berger argues that the Ordinance fails to substantially advance the Ordinance's purported goal of preserving the supply of affordable rental housing and since it therefore does not advance legitimate state interests it is a "regulatory taking." Petition at 5.

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[12] In the mobilehome context the term "vacancy control" is in reality a misnomer. As this Court noted in *Yee v. City of Escondido, supra,* 503 U.S. at 523 ("When the mobilehome owner wishes to move, the mobilehome is usually sold in place, and the purchaser continues to rent the pad on which the mobilehome is located.")

Berger argues (Petition at 8-11) that its Petition should be granted in order to resolve the "Regulatory Taking Issue Raised But Left Open By This Court in *Yee v. City of Escondido.*"

In *Yee v. City of Escondido, supra,* this Court considered virtually identical allegations by Yee and other City Parkowners (including Berger). 503 U.S. at 525-26. As discussed, *supra,* in *Yee,* this Court held that the Ordinance did not constitute a "physical taking" of the parkowner's land. 503 U.S. at 530, 532, 539.

During the course of its opinion, this Court indicated that Yee's "premium" argument was "perhaps within the scope of our regulatory taking cases" (*Id.* at 527) and the alleged "effect might have some bearing on whether the Ordinance causes a *regulatory* taking, as it may shed some light on whether there is a sufficient nexus between the effect of the Ordinance and the objectives it is supposed to advance." *Id.* at 530.[13] However, when asked by Petitioners to address the "regulatory taking" issue, this Court after first concluding that Petitioner's *as-applied* "regulatory taking" claim was "unripe" (because they had not sought rent increases) (*Id.* at 533-34) indicated that a *facial* regulatory challenge would be "ripe." *Id.* at 534.

Nevertheless, this Court did not decide this *facial* "regulatory taking" claim because such a claim had not

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[13] This Court also opined that to the extent that the Ordinance deprives Petitioners of the ability to choose their incoming tenants, "this effect may be relevant to a regulatory taking argument." *Ibid.*

been "presented" or "fairly included" in Yee's Petition for Certiorari. *Id.* at 535-38. In addition, the Court noted that unlike the "physical taking" question lower courts "have not reached conflicting results, so far as we know, on whether similar mobilehome rent control ordinances effect regulatory takings." *Id.* at 537-38. This Court concluded by stating "We leave the regulatory taking issue for the California Courts to address in the first issue." *Id.* at 538.[14]

A. The City's Ordinance Does Not Provide for Vacancy Control.

Although at the time of this Court's decision in *Yee*, it was assumed by all parties that the City's Ordinance provided for "vacancy control," in January 1996 another City parkowner sued in state court contending that the Ordinance did not in fact provide for "vacancy control." On March 8, 1996, the trial court issued a Preliminary Injunction preventing the City from enforcing the Ordinance in such a manner as to provide for "vacancy control." The Court of Appeal affirmed, concluding that the Ordinance "does not either expressly or impliedly provide for vacancy control." *Thomsen v. City of Escondido*, 49 Cal.App.4th 884, 897 (1996).[15]

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[14] Justices Blackmun and Souter concurred, but did not join in the Court's opinion concerning the Petitioner's allegations and arguments relating to the regulatory taking claim. *Id.* at 539.

[15] On January 15, 1997, the California Supreme Court denied the City's Petition for Review. *Thomsen, supra*, 49 Cal. App. 4th at 902.

Therefore, since at least March 1996[16] Berger has been free to set "such entry level rental rates as may be mutually agreeable between [it] and the prospective purchasers without such entry rents being limited by [the Ordinance]." *Thomsen, supra,* 49 Cal.App.4th at 890.

The Ordinance was an initiative ordinance, and can therefore only be modified by the voters. Under the circumstances, it is unlikely that Berger will be subjected to "vacancy control" in the near future.[17] In the absence of a current or reasonably foreseeable future application of "vacancy control" to Berger, this case is not an appropriate vehicle for a determination of whether or not "vacancy control" is a "regulatory taking". As the Court of Appeal pointed out in this case (Petition Appendix, A17), "Presumably, if the Ordinance were repealed, any

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[16] Even earlier, in May 1995 another Court decision provided Berger and other City parkowners with an alternative way to avoid "vacancy control." Pursuant to California Civil Code, section 798.17, a parkowner and a mobilehome owner may enter into a long term lease which is "exempt" from local rent control. Soon after the Ordinance was enacted the City enacted Ordinance 88-50 which prevented Parkowners from *requiring* new homeowners to sign such rent control exempt leases as a condition of renting a space in their parks. In May 1995, in *Mobilepark West Homeowners Ass'n v. Escondido Mobilepark West,* 35 Cal.App.4th 32 (1995), the Court of Appeal held Ordinance 91-19 (a later version of Ordinance 88-50) invalid as an improper amendment of an initiative measure (the Ordinance) and also partially preempted by Civil Code section 798.17.

[17] Since *Thomsen, supra,* City voters have twice considered and rejected ballot measures which expressly provided for "vacancy control." (Proposition O in November 1996 and Proposition T in November 1998.)

'wealth transfer' would soon evaporate." Cf., *United States Department of Justice v. Provenzano*, 469 U.S. 14, 15 (1984) (A controversy may end if the statute which is the basis for the action is repealed or if the challenged conduct is modified).

B. Premium Based Challenges to a Rent Control Ordinance are Facial Challenges and Berger Has Denied That it is Making a Facial Challenge.

In contrast to *Yee*, where Yee and the other Petitioners (including Berger) filed suit within a few months after the adoption of the Ordinance (see 503 U.S. at 525) Berger did not file this suit until February 1994, five and one half years after the Ordinance's enactment. As a result the statute of limitations on any *facial* taking claim has long ago passed. See, e.g., *De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084 (9th Cir. 1991) (Court held a claim that the County's vacancy control provision was a "taking" accrued when the mobilehome rent control ordinance was enacted in 1982 and was barred by applicable statutes of limitation); *Levald, Inc. v. City of Palm Desert*, *supra*, 998 F.2d at 688-89 (Facial "regulatory taking" challenge to the vacancy control provision of a mobilehome rent control ordinance was barred when not brought within one year of enactment).

In addition to the bar of the statute of limitations, a determination that Berger's "premium" claim is a *facial* regulatory claim also means that it is subject to *res judicata* based on the dismissal of Berger's prior state and

federal court suits which had raised similar claims.[18] See also, *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993) (Prior state court ruling upholding rent ordinance against physical taking claim based on lack of vacancy decontrol provision held to preclude not only "physical" but "regulatory taking claim" in federal court).

In addition, Berger also lacked "standing" to raise this *facial* regulatory taking challenge because when Berger acquired the Park in December of 1988 the Park was already subject to the Ordinance. In *Carson Harbor, supra*, 37 F.3d at 476-77, the Court held that a park owner lacked the "standing" to facially challenge the validity of an Ordinance in light of the fact that it had purchased the property after the Ordinance had been in effect and the "price paid for the property presumably reflected the market value of the property taken."[19]

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[18] Although in *Yee*, this Court indicated that it was unclear whether the Court of Appeal in *Yee v. City of Escondido, supra*, 224 Cal.App.3d 1349, had addressed the "regulatory taking" issue (503 U.S. at 534), in a subsequent case the state courts clearly indicated that they believed that Yee's original state court suit had *included* the "regulatory taking" issue. The day after this Court's *Yee* decision, Yee filed another state court action alleging the Ordinance effected a "regulatory taking." The trial court dismissed on *res judicata* grounds and the Court of Appeal affirmed, ruling both on the merits that "the Ordinance does not effect a regulatory taking" and also that "the doctrine of res judicata supports the trial court's decision." *Yee v. Mobilehome Park Rental Review Board*, 62 Cal.App.4th 1409, 1415 (1998).

[19] *Carson Harbor* is not unique in applying this "standing" requirement to regulatory taking challenges. See e.g., *Anello v. Zoning Board of Appeals*, 89 N.Y.2d 535 (1997), *cert. denied*, ___

In an attempt to avoid these bars Berger has consistently denied that it was making any "facial" challenge.[20] However, both the state and federal courts agree that Berger's position is wrong. In *Levald, Inc. v. City of Palm Desert, supra,* the Ninth Circuit specifically considered and rejected the argument that the claim that a Rent Ordinance results in the grant of a "premium" is an *as-applied* claim. The Court pointed out:

> That argument, however, is relevant only to a facial, not an as-applied, regulatory challenge. It is not a particular application of the statute that gives rise to the premium; the premium arises solely from the existence of the statute itself. Given that the existence of the premium does not give rise to an as-applied challenge, it seems that an as-applied challenge would have to focus on the reasonableness of the return on Levald's investment – in other words whether the allowable rent increases are large enough – and not on the "transfer" of the premium.

998 F.2d at 689.[21]

U.S. ___, 118 S.Ct. 2, 138 L.Ed.2d 1036 (1997) (Since Petitioner acquired property after enactment of a Steep-Slope Ordinance, its enactment did not deprive her of any investment backed expectation).

[20] In its Appellant's Opening Brief in the Court of Appeal, Berger entitled its last argument "No Part of the Berger Foundation's Claim Involves a "Facial" Challenge to the Rent Ordinance." *Id.* at 49.

[21] Here, of course, as discussed *supra,* Berger stipulated that it was not contending that it has been denied a "fair return" on its property. See Petition Appendix, D19.

See also, *Carson Harbor, supra,* 37 F.3d at 474 n.5 (Court rejected the notion that the alleged transfer of a "premium" under a mobilehome rent control ordinance is an *as-applied* regulatory taking claim).

The California cases have also treated similar "premium" claims as *facial* claims. For example, in *Yee v. Mobilehome Park Rental Review Board, supra,* 62 Cal.App.4th 1409-1410, the Court of Appeal in reiterating that this Ordinance did not constitute a "regulatory taking" stated:

> Finally, '[w]e reject the notion that [the transfer of the premium] constitutes an as-applied claim.' [Citation.] The premium is 'relevant only to a facial, not an as-applied, regulatory challenge. It is not a particular *application* of the statute that gives rise to the premium; the premium arises solely from the existence of the statute itself.' [Citation.] Because we find the Ordinance a proper economic regulation on its face, the Yees' regulatory challenge must fail."

See also, *Sandpiper Mobile Village v. City of Carpenteria,* 10 Cal.App.4th 542, 548-51 (1992), *cert. denied,* 507 U.S. 1032 (1993) (Court determined that the parkowner's claim that due to the alleged "premium" the mobilehome rent control ordinance did not advance a legitimate governmental interest was a *facial* challenge and therefore ripe for adjudication); *Westwinds Mobile Home Park v. Mobilehome Park Rental Review Board,* 30 Cal.App.4th 84, 95 (1994) (Court again described parkowner's challenge to the alleged "premium" as a *facial* challenge).

Under the circumstances the Court of Appeal was clearly correct in concluding that Berger's "premium" and "one time wealth transfer" claim was a "facial" not

an "as-applied" challenge and therefore "inappropriate for consideration." Petition Appendix, A17.

II

THERE IS NO DIRECT CONFLICT BETWEEN THE COURT OF APPEAL *BERGER* DECISION AND THE NINTH CIRCUIT'S DECISION IN *RICHARDSON V. CITY AND COUNTY OF HONOLULU*

Contrary to Berger's argument (Petition at 11-15), there is no direct conflict between the Court of Appeal's decision in *Berger* and the Ninth Circuit's decision in *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, ___ U.S. ___, 119 S.Ct. 168, 142 L.Ed.2d 137 (1998). In *Richardson*, the Ninth Circuit addressed the constitutionality of a Honolulu Ordinance which limited the number and timing of renegotiation of ground lease rents for residential condominiums; imposed a maximum ceiling on the renegotiated rents; and permitted a condominium owner-occupant to transfer his/her leasehold interest in the underlying land to a new owner-occupant of the condominium, keeping the same renegotiated land rent. 124 F.3d at 1163-64.

Certain landowners immediately (on the day the Ordinance was enacted, *Id.* at 1154) filed suits in federal court alleging *inter alia* that the Ordinance (91-96) constituted a "taking" because it created a "premium" which an owner-occupant could capture when he/she sold a condominium subject to the renegotiated rent. *Id.* at 1164. After determining that the landowner's claims were "facial regulatory taking claims" and therefore "ripe" (*Id.*

at 1165) the Court held that in the absence of any mechanism that prevented the owner-occupant from capturing the value of the reduced land rent in the form of a premium on the condominium sale meant that the cost of housing would remain the same and since therefore the Ordinance would not substantially further its goal of creating affordable owner-occupied housing in Honolulu the Ordinance was a regulatory taking. 124 F.3d at 1166.

Contrary to Berger's argument (Petition at 14), there is *no* indication that Berger ever raised the *Richardson* case in the lower appellate courts.[22]

In any event, *Richardson* is distinguishable from *Berger* in several respects. First, *Berger* involves mobilehome space rentals not condominium ground leases. As this Court apparently recognized in *Yee, supra,* 503 U.S. at 523-24, because of the substantial investments by mobilehome owners[23] and the relative "immobility" of

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[22] Berger did request to file a Supplemental Brief in August 1997 (prior to the Ninth Circuit's *Richardson* decision) relating to a recent California Supreme Court decision, *Kavanau v. Santa Monica Rent Control Board, supra.* On September 24, 1997, the Court of Appeal denied Berger's request to file a Supplemental Brief addressing *Kavanau.* There is no indication that Berger ever filed a second request seeking to submit supplemental briefing on *Richardson.* Berger's request for Oral Argument dated March 4, 1998, did not refer to *Richardson.* City does not remember any reference to *Richardson* in the May 11, 1998 oral argument. In its September 23, 1998, Petition for Review to the California Supreme Court, Berger did not refer to *Richardson.* Finally, in its October 23, 1998, Reply to Answer to Petition for Review, Berger did not refer to *Richardson.*

[23] See, K. Baar, "The Right to Sell the 'Im'Mobile Manufactured Home in its Rent Controlled Space in the

mobilehomes, mobilehome owners are often accorded unique protections.[24]

To City's knowledge, since this Court's *Yee* decision, no reported state or federal court decision had held that a *mobilehome* rent control ordinance constitutes a "regulatory taking" because it creates an alleged "premium." See, e.g., *Sandpiper Mobile Village v. City of Carpenteria, supra,* 10 Cal.App.4th at 549-51; *Palomar Mobilehome Park Ass'n v. City of San Marcos, supra,* 989 F.2d at 365; *Levald, Inc. v. City of Palm Desert, supra,* 998 F.2d at 688; *Westwinds Mobile Home Park v. Mobilehome Park Rental Review Board, supra,* 30 Cal.App.4th at 95 nn.7 & 8; *Carson Harbor Village Ltd. v. City of Carson, supra,* 37 F.3d at 472; *Yee v. Mobilehome Park Rental Review Board, supra,* 62 Cal.App.4th at 1415-16, 1419-21.

Second, unlike the Honolulu Ordinance, whose purpose was apparently limited to "maintaining affordable owner-occupied residential housing," the Escondido

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'Im'Mobile Homepark: Valid Regulation or Unconstitutional Taking," 24 Urban Lawyer 157, 159 & nn. 10, 12 (1992) ("In California, mobilehome prices ranging from $50,000 to $100,000 are standard . . . [a Los Angeles survey indicated that] on the average mobilehome owners have triple the investment of park owners in their spaces").

[24] For example, in 1995, the California state legislature enacted the Costa-Hawkins Rental Housing Act, 1995 Cal. Stats. Ch. 331 (codified as Cal. Civil Code, sections 1954.50-.53) which preempted local ordinances and phased out vacancy control applicable to all "owners" of residential rental property *except* those relating to mobilehomes or mobilehome parks.

In March 1996 a California state Initiative (Proposition 199) which would have extended "vacancy control" to mobilehome park owners was defeated. See AA 100.

Ordinance had much broader purposes. As the Court explained in *Yee v. Mobilehome Park Rental Review Board, supra,* 62 Cal.App.4th at 1420:

> The Yee's contention the ordinance fails to substantially advance a legitimate state interest must fail. The Ordinance substantially advances the City's goal of protecting current homeowners from rent increases in a captive and limited market. As recently stated by the Ninth Circuit, 'the prohibition of rent increases at the termination of a tenancy would further the law's goals, at least insofar as the purpose is to protect the investments of existing tenants.' [Citation.] '[T]he unfettered right of a park owner to raise the rent on a space when ownership of a mobile home was transferred might make it difficult for a mobile home owner to sell . . . . [T]he ordinance protects owners' investments in their units.' [Citation.]
>
> The Ordinance also advances the City's legitimate goal of protecting future homeowners by creating a climate in which purchasers can order and predict the economic investment they will make in the purchase of a mobilehome. The Ordinance advances legitimate City interests and is, therefore, valid.

Third, as discussed *supra,* in *Richardson* the landowners filed an immediate "facial" attack on the Ordinance and Berger waited over five years and then purported to file its claim as an "as-applied" challenge.

Finally, it is respectfully submitted that the application of the *Richardson* analysis to mobilehome rent ordinance is flawed because it does not address the issue of

market power. Mobilehome park owners exercise oligopolistic market power with respect to rent increases. Absent vacancy control, they can capture a resident's equity in his home by unreasonably increasing rents on sale. In contrast, the mobilehome owner has no market power to charge above market prices for his home. Moreover, regardless of the purchase price he pays for a mobilehome, absent vacancy control, the new buyer will still lose any equity he builds up in his home if the parkowner raises rents exorbitantly during his occupancy, and again later upon his resale.

At least in regard to mobilehome ordinances, vacancy control is not a "zero sum game." From an affordable housing point of view, even with vacancy control the initial costs of mobilehome ownership for prospective purchasers (including purchase costs and space rents) will often be much lower than those costs in the absence of vacancy control.[25]

In any event, since *Richardson* is distinguishable and was not raised in the lower courts it should not be grounds for granting this Petition.

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[25] See, e.g., K. Baar, "Vacancy Control Under Montclair's Mobilehome Rent Ordinance," June 30, 1998, supplemented July 15, 1998. In a study commissioned by the City of Montclair, California, Dr. Baar concluded that Montclair's Ordinances which provided for *vacancy decontrol* had adverse impacts on affordable housing as compared with surrounding cities which had vacancy control ordinances.

III

THE HEIGHTENED SCRUTINY STANDARD IS NOT APPLICABLE TO THIS TYPE OF REGULATORY TAKING CLAIM

Berger argues (Petition at 15-20) that the Court of Appeal erred by not applying the heightened level of judicial scrutiny established by *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Both *Nollan* and *Dolan* are factually distinguishable in that both cases required the *dedication* of real property in return for obtaining building permits. Neither case related to the landlord-tenant context much less the application of a rent control ordinance. In contrast, in *Pennell v. City of San Jose, supra*, 485 U.S. at 12-13 and n.6, a case which did involve rent control, this Court did not mention the *Nollan* test and appeared to apply a much more deferential standard affirming that the protection of tenants from excessive rent increases is a legitimate governmental interest. Similarly, while in *Yee, supra*, this Court briefly mentioned *Nollan* (see 503 U.S. at 530) it never articulated that a "strict scrutiny" test was applicable to its examination of rent control ordinances but to the contrary indicated that such landlord-tenant regulation instead was subject to its multifactor analysis. *Id.* at 529.[26]

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[26] This Court cited to *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) which in turn referred to *Penn Central Transportation Co. v. New York City, supra*, 438 U.S. at 124.

Following the California Supreme Court's decisions in *Ehrlich v. City of Culver City, supra,* 12 Cal.4th at 868 the Court of Appeal in *Berger* properly held that this case does not fit into the "narrow range of cases" which trigger the heightened standard of scrutiny of *Nollan* and *Dolan*. Petition Appendix, A13-14.[27]

Instead, the Court of Appeal evaluated the "application" of the Rent Ordinance under a "reasonably necessary" standard of review based on the California Supreme Court decisions in *Kavanau v. Santa Monica Rent Control Board, supra,* 16 Cal.4th at 775 and *Landgate, Inc. v. California Coastal Commission, supra,* 17 Cal.4th at 1022. Petition Appendix, A15-19. After noting that there is "a strong presumption in favor of the Ordinance's validity" (*Id.* at A16) the Court addressed and rejected Berger's "one time wealth transfer" and "City's scheme" arguments. *Id.* at A16-19. Focusing instead on the *actual application* of the Ordinance to Berger's property the Court of Appeal concluded:

> Here, there is no doubt the Board's decision substantially advances the purpose of the Ordinance. Berger sought a rent increase of nearly $70, and the Board approved $16.12. The tenants

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[27] Subsequent to the Court of Appeal decision in *Berger*, the California Supreme Court again specifically addressed whether the heightened scrutiny standard applies to rent control legislation and concluded "the standard of review for generally applicable rent control laws must be at least as deferential as for generally applicable zoning laws and other legislative land use controls. Thus, the party challenging rent control must show 'that it constitutes an arbitrary regulation of property rights.' " *Santa Monica Beach, Ltd. v. Superior Court,* 19 Cal.4th 952, 967 (1999).

> at the Town and Country, especially those living on fixed incomes, were certainly benefited by such a limitation on rent increases on their spaces. *The rent increase ultimately approved by the Board fell within the range of increases called for by its analytical methods, and was in fact at the high end of one of them.* We therefore conclude the Board's decision *was supported by substantial evidence* and satisfies the government interest prong. [Emphasis added.] *Id.* at A-19.[28]

IV

THERE IS NO REAL CONFLICT BETWEEN CALIFORNIA STATE COURTS AND NEW YORK REGARDING THE LEVEL OF SCRUTINY APPLIED TO RENT ORDINANCES

Citing *Seawall Associates v. City of New York*, 74 N.Y.2d 92 (1989), *cert. denied*, 493 U.S. 976 (1989) and *Manocherian v. Lenox Hill Hospital*, 84 N.Y.2d 385 (1994), *cert. denied*, 514 U.S. 1109 (1995), Berger argues that there is a conflict between the state courts of California and New York regarding the level of scrutiny in regulatory takings cases. Petition 20-21. Berger's argument is without merit because both those cases are distinguishable.

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[28] Berger's quotation of this portion of the Court of Appeal decision (Petition at 17-18) leaves out the crucial elements (emphasized above) which indicated that the Court of Appeal had in fact analyzed the Board's decision to determine its actual impact. In any event, as discussed *supra*, note 11, in a subsequent ruling the Court of Appeal further reviewed the Board's $16.12 rent decision and concluded that the matter should be remanded for a new hearing.

In *Seawall, supra,* the New York Court examined a New York City law which required certain building owners to (1) rehabilitate and make habitable their buildings; (2) lease every unit at controlled rents to "bonafide tenants"; (3) provide civil penalties if any unit remained vacant for 30 days; and (4) prohibited the conversion, alteration or demolition of the buildings. 74 N.Y.2d at 100. The Court distinguished the cases upholding rent control and other landlord-tenant regulations on the grounds that those cases (as does *Berger*) had involved restrictions imposed on existing tenancies where the landlord had voluntarily put their properties to use for residential housing and held that the New York law was both a physical and regulatory taking. *Id.* at 102, 105.

After pointing out that the New York City provisions had effectively deprived the landlords of all economically viable use of their properties (*Id.* at 110), the Court also concluded that the law did not substantially advance legitimate state interests because it imposed too great a burden on the landlords to meet the societal problem of the homeless. *Id.* at 117.[29]

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[29] Subsequent to this Court's *Yee* decision the New York Court decided *Rent Stabilization Association v. Higgins,* 83 N.Y.2d 156 (1993), *cert. denied,* 512 U.S. 1213 (1994), which considered whether regulations enlarging the class of "family members" entitled to succeed to a rent-regulated apartment on the death or departure of the tenant was a "taking." Distinguishing *Seawall, supra,* the Court held that there was no "physical" or "regulatory taking" because the regulation did not require a new use of the already rent regulated property, did not "affect the owner's right to receive the regulated rents, unchallenged as a reasonable return," and *unlike Seawall,* there was a nexus between the challenged regulation and the stated purpose of

In *Manocherian,* owners challenged the validity of Chapter 940 of the New York laws of 1984 which required them to offer renewal leases to Lenox Hill Hospital for apartments occupied by some of the Hospital's employees. Chapter 940 exclusively related to the renewal rights of not-for-profit hospitals which had formerly subleased rent stabilized apartments to their employees. The Court pointed out that the legislative history of Chapter 940 revealed that Lenox Hill Hospital, not the actual apartment dwellers, was the "principal agent in urging the amendment" and was the "primary and real beneficiary of this legislation." 84 N.Y.2d at 391.

The Court distinguished this Court's decision in *Yee v. City of Escondido, supra,* stating that *Yee* dealt with an entirely different statutory scheme because in *Yee* the challenge was to a local rent control ordinance (the same ordinance challenged here) that applied to all mobilehome parks in the municipality and Chapter 940 was a "targeted, narrow, special interest . . . " local law. 84 N.Y.2d at 399. It was in this context that the Court held that there was a fundamental defect in Chapter 940 because it was enacted purely to serve the private interests of Lenox Hill and therefore failed to advance a legitimate state interest.

Since neither *Seawall* nor *Manocherian* involved mobilehome ordinances and are clearly distinguishable there is no conflict warranting Supreme Court review.

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preventing the eviction of identified beneficiaries. 83 N.Y.2d at 172.

CONCLUSION

This case is not an appropriate vehicle to review the issue of whether vacancy control in a mobilehome rent control context results in a "premium" or "one time wealth transfer" and is a regulatory taking. First, the City's Ordinance does not provide for vacancy control. Second, Berger's argument against vacancy control is a "facial claim," however Berger has disavowed that it is making such a claim. Third, the alleged conflict with the Ninth Circuit *Richardson* decision was not raised below and in any event *Richardson* is distinguishable. Fourth, the Court of Appeal applied the appropriate standard of judicial scrutiny to the Board's actions. Fifth, the New York cases cited by Berger as conflicting are distinguishable. Under the circumstances, Berger's Petition for Certiorari should be denied.

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Respectfully submitted,

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